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No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee), JULIA CORPUS de MORALES (Widow), JUAN ANTONIO MORALES, and DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
(Insurer),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court may review certain claimed federal constitutional violations regarding the Georgia Workers' Compensation Act death benefits provisions, in a case in which the Petitioners have failed to properly raise, preserve and obtain rulings regarding such federal issues in the state proceedings below?

2. Whether the United States Constitution requires that citizens and subjects of foreign sovereigns, who are not and have not been present within the territorial jurisdiction of the United States, and who have no corresponding responsibilities to the United States, be permitted to assert the full protections of the equal protection clause of the Fourteenth Amendment, as if they were citizens or aliens resident within the jurisdiction?

3. Whether the judgment of the state court below would be affirmed on independent state grounds, where a threshold question regarding the nature of the rights of the pertinent parties has been decided by the state court as a matter of state statutory construction?

4. Whether the death benefits provision of the Georgia Workers' Compensation Act, which provides identical benefits to a citizen's dependent beneficiaries and resident alien's dependent beneficiaries, complies with the federal equal protection clause when it reduces death benefits only as to dependent beneficiaries who are nonresident aliens?

5. Whether, assuming that a federal supremacy clause issue had been raised and decided below, the challenged death benefit limitation must be invalidated as an impermissible burden on the entrance or residence of alien workers, in conflict with any exclusive authority actually exercised by Congress?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

COME NOW Barge-Wagener Construction Company, Employer, and Argonaut Insurance Company, Insurer, Respondents, and respectfully respond to the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Georgia in this case.

I.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

As stated in the Petition for Writ of Certiorari, the questioned portion of the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-265(b)(5), was initially challenged by the Petitioners during the administrative law proceedings below, as being violative of the equal protection clauses of the Georgia and United States Constitutions. Then, before the Superior Court of Fulton County in its role as an appellate court, the Petitioners did initially seek a declaration of unconstitutionality under either the Georgia or federal Constitution. However, that court reached a decision only as to the state law question, and did not pass upon the federal question.

At all times after the issuance of the order of the Superior Court of Fulton County, the Petitioners have declined to seek, and the Georgia Supreme Court did not consider, any review of O.C.G.A. § 34-9-265(b)(5) as being violative of the federal Constitution. Rather, in response to the appeal of the Respondents herein to the Supreme Court of Georgia, the Petitioners expressly abandoned any quest for appellate review of any federal question. In their brief to the Supreme Court of Georgia, Petitioners did not raise the separate federal ground, did not argue it, and expressly asked that the Court affirm the order of Superior Court on exclusively state constitutional grounds. (Appendix 1-7). The Supreme Court of Georgia did not have before it, and did not pass upon, the federal questions raised by Petitioners before this Court.

Further, at no stage of the proceedings below, either at trial or on appeal, have the Petitioners raised any allegation of constitutional infirmity of the challenged statute on federal supremacy clause grounds. Such

grounds are presented for the first time in their petition to this court of last resort.

II.

SUMMARY OF ARGUMENT

In a manner clearly contrary to the controlling precedents of this Court, the claimed statutory basis for jurisdiction, and the rules of this Court governing review on writ of certiorari, the Petitioners herein seek to raise a series of questions regarding federal constitutional law, which have not been properly raised and passed upon by the trial and appellate courts below.

In their petition to this Court the Petitioners have asserted that the challenged statute is unconstitutional under the federal Constitution as being violative of the supremacy clause, in that it allegedly "imposes a discriminatory burden upon aliens lawfully within the United States and conflicts with Congress' exclusive constitutional authority to regulate immigration and naturalization." However, as revealed by their own failure to specify to this Court the points in the proceedings below where such issue was raised, as required by this Court's Rule 14(h), no such question regarding exclusive federal power to regulate immigration under the supremacy clause was ever raised at any stage of the litigation below. Therefore, the Petitioners are barred from raising such issue before this Court for the first time.

Although during the trial and initial appellate stages of this litigation the Petitioners did raise both Georgia and federal constitutional equal protection questions, no administrative tribunal or court has ever passed upon any such federal equal protection question. Rather, at all stages, this case has been decided exclusively on state statutory and constitutional grounds. Further, the Petitioners have not only failed to properly preserve and seek

ruling upon such federal questions, they have in fact expressly abandoned any federal equal protection question before the appellate courts of Georgia. Under the controlling precedents of this Court, the Petitioners are barred from seeking an initial determination of such questions by this Court, as this Court must conclude that Petitioners have failed to properly present and seek ruling upon any federal question in the state courts.

Further, contrary to the jurisdictional mandate of 28 U.S.C.A. § 1257, as applied by this Court in its Rule 10, the Petitioners have failed to demonstrate that, in this case, the Georgia Supreme Court has decided any federal question in a manner in conflict with the decision of any other state's highest court as to this same question. Although the courts of Florida and Kansas may have erroneously attempted to extend the reach of equal protection beyond the borders of the United States, the appellate courts of Georgia in this case did not decide any such issue. Therefore, this case does not present a question for this Court's consideration under Rule 10.1(b).

It is respectfully submitted that, if this Court were to grant this petition, the resulting decision on the merits would inevitably be the same as that reached by the Supreme Court of Georgia, for reasons of state law which are independent of any federal question, and which themselves determine the outcome. As such, consideration of this case would result in nothing more than an advisory opinion as to the validity of the decision of the state courts regarding questions of state law. Under such circumstances, jurisdiction is lacking.

The Petitioners are nonresident aliens, who are not and have not been present within the jurisdiction of the United States, such as would empower them with federal equal protection rights with which to challenge the Georgia Workers' Compensation Act. As a result, the Supreme

Court of Georgia correctly held that such nonresident aliens may not invoke the constitutional protections reserved for citizens and residents of Georgia and the United States. Therefore, to whatever extent the death benefits provision discriminates against them, such discrimination is not unlawful.

Before the Supreme Court of Georgia the Petitioners sought to expand the reach of the Georgia Constitution's equal protection clause beyond the borders of the United States. Here, the Petitioners would have this Court, in effect, adopt such a "global view" of the reach of the federal equal protection clause. Further, the fallacious argument advanced by Petitioners to achieve this purpose would require that this Court overrule the judgment of the state Supreme Court as to purely state law questions of statutory construction, and in effect, allow the Petitioners to assert the constitutional rights of a deceased third party. However, the law of Georgia, the law of a majority of sister states interpreting their own similar statutes, federal precedent and the leading scholarly treatise all establish that workers' compensation death benefits are independent and mutually exclusive of any benefit to which the deceased worker could have asserted any interest. Therefore, the Petitioners may not stand in the shoes of the deceased worker in order to assert constitutional rights which they themselves lack. Indeed, constitutional rights are personal, and may not be asserted here vicariously.

Properly analyzed, the Georgia Workers' Compensation Act in no way discriminates unlawfully. The benefits to which a resident alien worker has an actual legal interest, and may make claim, are identical to those which benefit a worker who is a United States citizen. Medical and disability benefits, regarding which the worker has an actual interest, are granted without regard

to national origin. Further, dependents of alien workers, who are themselves residents, become entitled to full death benefits on the same footing as citizen dependents. Thus, constitutionally protected resident aliens are not subject to any unlawful discrimination. The Georgia Legislature has, however, decided to sharply limit death benefits flowing to foreign nationals who reside outside the jurisdiction, in a manner which offends no provision of the federal Constitution.

Assuming, *arguendo*, that the Petitioners were entitled to some degree of equal protection, the appropriate standard of review would be the "rational basis" test. The rationale for heightened scrutiny is lacking here, in that the Petitioners themselves are not a "discrete and insular minority" subject to the laws of the United States; indeed, they are not subject to the laws at all, as they have elected to reside in their own nation. Therefore, the challenged statute is entitled to deferential review as to the conceivable rational bases for it. Here, the difficulties involved in administering such a benefit plan on behalf of beneficiaries residing in foreign nations could be considerable, such that a conservative fixed benefit is hardly "irrational."

III.

ARGUMENT AND CITATION OF AUTHORITY

A. THE PETITIONERS HAVE COMPLETELY FAILED TO CARRY THEIR BURDEN OF DEMONSTRATING TO THIS COURT THAT ANY FEDERAL CONSTITUTIONAL QUESTION HAS BEEN PROPERLY RAISED, PRESENTED AND PASSED UPON IN THE PROCEEDINGS BELOW.

1. The Petitioners abandoned any federal constitutional question before the Supreme Court of Georgia.

At the initial trial and appellate levels the Petitioners did raise a constitutional challenge to O.C.G.A.

§ 34-9-265(b)(5) on state and federal grounds. However, in rendering its decision on appeal, the Superior Court considered only the state constitutional equal protection argument when it declared the statute to be unconstitutional; that court expressly did not reach any federal question. (Appendix pp. 1A-8A of Petition for Writ.) Respondents herein sought and were granted an appeal to the Supreme Court of Georgia, citing the Superior Court's interpretation of state statutory and state constitutional law as being in error. On appeal to the Supreme Court of Georgia the Petitioners herein declined to urge the Court to consider any federal question whatsoever; rather, on brief and oral argument the Petitioners expressly urged that court to affirm the order of the Superior Court exclusively on state constitutional grounds. (Appendix 1-7.) The Supreme Court of Georgia properly considered and passed upon only those issues presented to it, those being exclusively state law issues. (Appendix pp. 1A-8A of Petition for Writ.)

The Petitioners timely filed a Motion for Reconsideration with the Supreme Court of Georgia, pursuant to Georgia Supreme Court Rule 47. However, that motion and the brief in support thereof presented to that Court no federal question; rather, the Petitioners expressly asked that Court to reinstate the order of the Superior Court on exclusively state constitutional grounds. Indeed, the Petitioners conceded that there was no federal constitutional right which they could invoke in their favor. Rather, the Petitioners argued,

> Applicants would argue this Court look no further in its equal protection analysis than the State Constitution of Georgia. The property right was created by the State of Georgia and should be governed by our state Constitution which decrees that protection to person and property shall be *impartial* and complete.

(Appendix 11-12.) Having previously considered fully the questions of state statutory and constitutional law, the Court denied that Motion for Reconsideration. (Appendix 1A of the Petition for Writ.)

2. The Petitioners failed to follow established state appellate court procedure regarding preserving any federal issue to be presented on petition for writ of certiorari.

The rules promulgated by the Supreme Court of Georgia provide for a procedure in those cases where a dissatisfied party intends to seek review by the United States Supreme Court of any federal question decided by the state court. Georgia Supreme Court Rule 61 requires that

> Any party desiring to have the remittitur stayed in this court in order to appeal or seek a writ of certiorari in the United States Supreme Court shall file in this court a motion to stay the remittitur with a concise statement of the issues to be raised on appeal or in the petition for certiorari. Such notice shall be filed at the time of filing a motion for rehearing, or if no motion for rehearing is filed, within the time allowed for the filing of same.

Here, the Petitioners filed and served upon Respondents herein only a Motion for Reconsideration, solely on state grounds, while no motion to stay the proceedings pending petition for writ of certiorari with this Court was filed and served. As stated by this Court in *Webb v. Webb*, 451 U.S. 493, 495 (1981), a party's failure to comply with state procedural rules regarding the raising and preservation of issues may result in this Court declining to consider such issues.

3. Any federal constitutional question not properly raised and passed upon by the state appellate court below may not be raised and considered in the United States Supreme Court.

Although there has been some debate within the opinions of this Court as to whether such a bar to consideration is jurisdictional or prudential, it is absolutely clear that the Petitioners are barred from presenting to this Court any federal constitutional question which was not pressed or passed upon in the state proceedings below. In a petition for writ of certiorari, where the state court has not passed upon any federal question, it will be assumed that such is the result of a want of proper presentation by the interested party in the state court. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987). Only where the interested party can demonstrate affirmatively to the contrary will this Court conclude that such party has properly presented such issue, yet been denied a decision. *Id.*

In *Webb v. Webb, supra*, 495, this Court concluded that a petition for writ of certiorari was improvidently granted where it was subsequently revealed that the petitioner had failed to expressly raise and obtain a decision as to a federal question. Just as the Court did in *Rotary Club, supra*, the Court cited the well established rule in this regard as found in *Street v. New York*, 394 U.S. 576, 582 (1969). To be clear, this Court requires that such federal question be both raised and passed upon by the court below; otherwise, even if initially entertained on a writ of certiorari, this Court will decline to decide a federal issue in the absence of a lower court decision on the issue. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). Further, as indicated above and in *Webb, supra* at 495, this Court will require a party to comply with procedural rules of the state appellate court. Here, the Petitioners failed to

comply with Ga. Supreme Ct. Rule 45, which states that any argument not advanced on brief is abandoned. *Watts v. Mitchell*, 227 Ga. 247, 179 S.E.2d 774 (1971).

The federal constitutional equal protection issue which the Petitioners would have this Court review is simply not properly presented before this Court. Under the authority cited above, the mere fact that the Petitioners obtained no decision of any federal question in the courts below is reason enough to deny the petition. *Rotary Club, supra; Webb, supra; Street, supra; Gates, supra.* Here, however, the record supports more than a mere assumption that such issues were not properly presented below. Rather, the written arguments and motions submitted to the court below demonstrate without doubt that the Petitioners elected to rely exclusively upon a state law-based challenge to the statute, such that no federal constitutional question has been preserved for presentation to this Court. At the very least, principles of comity require that the Petitioners not be permitted to reserve review of the federal question until brought before this Court. Indeed, it is submitted that, under the facts and controlling authorities, the jurisdiction of this Court over any federal question has not been demonstrated.

B. THE PETITIONERS HAVE FAILED TO DEMONSTRATE THE PRESENCE OF ANY SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF THE WRIT, AS THIS CASE DOES NOT PRESENT A DISPUTE IN WHICH THE SUPREME COURT OF GEORGIA HAS DECIDED ANY FEDERAL QUESTION IN A MANNER IN CONFLICT WITH A DECISION OF THE HIGHEST COURT OF ANY OTHER STATE.

The Petitioners argue that the highest courts of several states conflict as to the federal equal protection issues supposedly presented in this case. However, the

nature of what conflict there has been among the other state courts has been largely the result of differences of opinion among those state courts regarding state law questions of interpretation of the nature of the benefits and statutory rights created by the various state workers' compensation statutes.

The appellate courts of two states, Florida and Kansas, have recently deviated from the majority view of the respective nature of the rights and benefits created by workers' compensation disability and death provisions. The accepted and better reasoned view is that death benefits are *sui generis*, completely independent of any "property interest" of the worker, such that the worker has no "rights" to such benefits. The critical point here is that these decisions turn entirely upon state law interpretations of the nature of workers' compensation death benefits, as they are created and defined by state statutes. *DeAyala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (Fla. 1989); *Pedrazza v. Sid Fleming Con., Inc.*, 94 N.M. 59, 607 P.2d 597 (1980); *Jalifi v. Industrial Commission of Arizona*, 644 P.2d 1319 (Ariz. Appeals 1982); *Jurado v. Popejoy Construction Co.*, 853 P.2d 669 (Kansas 1993); *see also State Industrial Insurance System v. Lodge*, 822 P.2d 664 (Nev. 1991) and Larson, *Workmen's Compensation Law*, § 78.62 (1992).

Further, and fatal to the Petitioners' position in their petition, is the fact that, in this case, the highest court of Georgia has not decided any federal question, expressly or by implication, in a manner in conflict with any other state's court. Indeed, no federal question has been decided at all. Therefore, pursuant to this Court's Rule 10.1(b), no reason is presented for this Court to grant the writ in this case.

C. THE PETITIONERS ARE NONRESIDENT ALIENS, NOT PRESENT WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES, SUCH THAT THEY LACK STANDING TO ASSERT ANY CONSTITUTIONAL EQUAL PROTECTION RIGHTS WITH WHICH TO ATTACK THE STATUTE.

The Petitioners would demean the analysis of the Supreme Court of Georgia, when the Petitioners assert that the Court effected an "end run" around controlling equal protection provisions in order to "save an archaic and discriminatory statutory provision." Petition at p. 10. To the contrary, it is the Petitioners who would have this Court engage in such an "end run" around well settled constitutional principles, in order to avoid what remains the ultimate fatal flaw in their case: the fact that nonresident aliens are parties who may not assert any constitutional equal protection rights, invoking any level of judicial scrutiny, in order to attack the validity of O.C.G.A. § 34-9-265(b)(5). The Petitioners would urge this Court to effect a radical deviation from controlling constitutional authorities, and in effect, proclaim a new "global view" of constitutional rights, which this Court has previously, and expressly, rejected.

1. The constitutional equal protection rights which the Petitioners attempt to assert are properly derived only from either citizenship or substantial territorial presence, both of which are lacking in this case.

The Petitioners would have this Court effect an "end run" around not only the plain language of the equal protection clause of the Fourteenth Amendment, but all of the opinions of this Court interpreting the application of that clause, as well.

> . . . no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. This Court has repeatedly held that federal constitutional rights arise from two sources only: either citizenship or presence within the territorial jurisdiction with substantial connections to the jurisdiction. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). Affirming the principle of territorial jurisdictional limitation enunciated in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court in *Verdugo-Urquidez* held that aliens who are not present within the territory of the United States simply do not have the benefit of fundamental United States constitutional protections. Aliens who are residents are afforded equal protection of the laws because they are subject to the laws of the jurisdiction, and have protections commensurate with their ties and obligations to the jurisdiction. *Yick Wo v. Hopkins*, 118 U.S. 396 (1889); *Graham v. Richardson*, 403 U.S. 365 (1971). However, at no time has this Court construed the plain language of the Fourteenth Amendment as extending the protection and power of the equal protection clause beyond its borders and its citizenry. Indeed, in response to an attempt to extend Fourth Amendment and Fifth Amendment protections to nonresident aliens, this Court has recently rejected this "global view" of the Constitution. *Verdugo-Urquidez, supra* at 268.

2. As the Petitioners are not resident aliens, and are not themselves subject to the laws of the jurisdiction, there exists neither a rationale nor a jurisdictional basis for their claim to assert equal protection-heightened scrutiny.

Resident aliens are treated as a "discrete and insular minority" within the jurisdiction, being subject to the power of the jurisdiction and having substantial ties and

obligations to it. *Yick Wo v. Hopkins, supra; Graham v. Richardson, supra.* However, the Petitioners in this case possess neither the constitutional jurisdictional basis with which to assert the protection of the equal protection clause, nor the unique status of a "discrete and insular minority" which justifies heightened judicial scrutiny. Although their husband and father, the decedent, did enter the jurisdiction and thereby invoke corresponding rights and obligations as to himself, neither he nor the Petitioners in any way ever submitted or subjected the Petitioners to the jurisdiction, such as would invoke either right or obligation. This being obvious, the Petitioners now seek to have this Court bestow upon them constitutional rights, as if they stood in the shoes of the decedent.

3. There is no support in law for the Petitioners' claim that they have standing to assert the constitutional equal protection rights of a deceased third party.

Contrary to the assertions of the Petitioners, the decision of the Georgia Supreme Court does not rest upon a "failure to properly focus" constitutional analysis upon the deceased resident alien worker. Rather, that Court properly applied the correct constitutional analysis to the correct statutory analysis of the nature and position of the parties, and of the benefits created and defined by the challenged statute. The Petitioners would have this Court substitute its judgment for the judgment of the state Supreme Court, as to those questions of state statutory construction which are exclusively within the province of the state court.

a. To the extent that the Petitioners may make claim to a statutorily-created benefit, they are litigants who have standing, but only to assert rights actually conferred by operation of statute or constitution.

It is not denied that the Petitioners are "persons" who may assert due process rights in order to protect whatever lawful interests they may have as parties to this action. U.S. CONST. amend. XIV. However, those "property" interests to which the Petitioners are entitled are only those which have actually been created or have accumulated pursuant to law. Due process rights may not be invoked to subsequently modify the value of the interest to which an entitlement is asserted.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564 (1972).

> For appellants to acquire the right contended for, so that it is a protected "property" interest under the Fourteenth Amendment, it must appear that the state intended to confer that right. Once conferred, its deprivation requires compliance with procedural due process.

Child v. Beame, 412 F.Supp. 593, 605 (DCNY 1976).

However, the Petitioners here seek to substantively expand the value of the state-created workers' compensation death benefit, by claiming that they must also be allowed to assert the equal protection rights of the decedent resident alien. The Petitioners would have this Court, in effect, adopt the "global view" of constitutional rights which it has previously rejected, and then substitute its judgment as to purely state law questions, in

order to achieve what the Petitioners would urge as a "desirable" result in this case. The mechanism the Petitioners would have this Court employ would involve a defective analysis of the nature of the rights and interests of the various persons affected by the statute. Having been granted a statutorily created, albeit limited, death benefit, the Petitioners would then have this Court bootstrap the Petitioners into the place of the decedent worker, so that the Petitioners may then claim that the statute has somehow violated the constitutional rights of the resident alien deceased worker.

b. Constitutional equal protection rights are personal, and here, jurisdictional; as such, the purported rights of the deceased third party may not be asserted vicariously in order to invalidate the statutory death benefits provision.

Fundamental constitutional rights are personal and may not be asserted vicariously. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *County Court of Ulster v. Allen*, 442 U.S. 140 (1979). Where, as here, the Petitioners do have some stake in the controversy, the issues regarding which they have standing to mount a constitutional challenge are necessarily limited by whatever legal rights and interests they actually possess.

The Petitioners "must assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of the third party." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A statutory scheme which necessarily entails a right to sue, i.e. standing, does not also effectuate a transfer of some related third party's constitutional rights. *Id.* Even where there is a close relation between the litigant and the third party, the general rule is that persons must assert their own rights. *Singleton v. Wulff*, 428 U.S. 106 (1976).

Further, it is axiomatic that litigants may not assert supposed civil or constitutional rights of deceased persons, as such rights do not survive the death of such person. *Roe v. Wade*, 410 U.S. 113 (1973); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied* 454 U.S. 833 (1981); *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979); *see also* dissent in *DeAyala v. Florida Farm Bureau Casualty Insurance Co., supra.*

The only lawful exceptions under which this Court has permitted litigants to seek redress regarding the rights of third parties have been in those cases involving "the most weighty countervailing policies". That is, such may be allowed only where individuals not party to a suit stand to suffer some actual loss by its outcome, yet have no effective avenue of preserving their rights themselves, or in certain First Amendment cases. *Broadrick, supra* at 611. Such factors are completely lacking in this case, as the third party decedent was subject neither to hostile legislation nor any bar to litigation, as to his own rights.

D. THE DEATH BENEFITS PROVISIONS OF THE GEORGIA WORKERS' COMPENSATION ACT DO NOT FAIL TO SATISFY THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE.

It is critical to note from the outset that the Georgia Workers' Compensation Act provides resident aliens working in the United States with the same benefits as it does U.S. citizens. The medical and disability benefits created by the Act for the benefit of the worker are identical as to aliens and citizens. O.C.G.A. §§34-9-1; 34-9-200 *et seq.*; 34-9-260-264. Indeed, if the Act did discriminate against the resident alien worker by reducing the value of the benefits to which he or she might make claim, then the Act might be subject to heightened scrutiny equal protection attack. However, the Act does not

make any distinction between the resident alien and the citizen in terms of any form of benefit to which the resident alien has any actual "property interest." The death benefits provisions of the Act are a separate and independent statutory scheme of benefits, created only to benefit persons other than the worker, and not subject in any way to control or claim by the worker. As such, the worker has no identifiable legal interest in death benefits which may accrue, if at all, only after the death of the worker and a showing of ongoing dependency by the dependents.

1. The nature of the rights and benefits of the Petitioners as surviving dependents are different in kind from, and independent of, the rights and benefits of the deceased worker.

A threshold question in the proceedings below was resolved by way of the highest appellate court of Georgia construing the nature of the rights and benefits which flow to dependents, as opposed to workers. Here, the Supreme Court of Georgia, in a manner consistent with the majority of other state courts, construed its own unique death benefits statute as involving sets of benefits and rights, created for workers and surviving dependents, which are separate, distinct and indeed, mutually exclusive of each other. The Petitioners urge this Court to substitute its judgment regarding how the Georgia Legislature and courts might have granted broader and more valuable benefits, without citing any precedent for the proposition that the Constitution requires such a result.

a. Workers' compensation death benefits vest exclusively in the surviving dependent, and are in no way the "property" of the deceased worker.

The Supreme Court of Georgia correctly rejected the theory advanced by the Petitioners below, that the

statutory death benefits are a "property" interest of the deceased worker, such that limiting such "property" as flowing to nonresident alien dependents would then violate the constitutional rights of the deceased worker. Rather, the Court held that, "Death benefits do not become part of the estate of the deceased, and are not liable for his debts," but rather, such benefits are, "the exclusive property of the beneficiaries." Appendix of Petition, p. 3A. Such benefits "are separate and distinct from the right to compensation vested in the employee by reason of injury." *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2nd Cir.), *cert. denied* 304 U.S. 565 (1938). The interpretation by the Supreme Court of Georgia as to its statute incorporates the majority rule among the states. *State Industrial Insurance System v. Lodge, supra; Pedrazza v. Sid Fleming Con., Inc., supra; Jalifi v. Industrial Commission of Arizona, supra; Alvarez Martinez v. Industrial Commission*, 720 P.2d 416 (Utah 1986).

The deceased employee had no control over, and could have derived no actual benefit from, any death benefit which might accrue after his death. He could not exchange it for value or modify it in any way. It was never his "property." *Turner v. United States Fidelity & Guaranty Co.*, 125 Ga. App. 371, 187 S.E.2d 905 (1972); Larson, *Workmen's Compensation Law*, §64.00-64.10 (1992).

b. The theory advanced by the Petitioners, to the effect that the deceased resident alien was denied something to which he was constitutionally entitled, is wholly without support in constitutional or statutory law.

The Supreme Court of Georgia correctly declined to follow the circular reasoning of the Florida court in *DeAyala, supra*, to the effect that the death benefits limitation somehow diminishes the "fruits of labor" of the resident alien. Quite obviously, the only reasoning through which

the Florida court then permitted a constitutional challenge to the statute required that the court completely ignore the principles which prohibit the dependents from asserting the constitutional rights of the decedent. *Broadrick, supra; Roe v. Wade, supra; Silkwood v. Kerr-McGee, supra.*

In their petition to this Court, the Petitioners argue for an identical conclusion as in *DeAyala*, while attempting to frame their argument in terms of language of this Court, derived from cases deciding completely dissimilar issues. The Petitioners' reliance upon *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1974), is misplaced, as the issues therein were insupportable gender-based discrimination, in absence of any issues pertaining to nonresident aliens. *Nyquist v. Mauclet*, 432 U.S. 1 (1976) is equally inapposite, as it involved a well-founded challenge by resident aliens to a state barrier to equal higher education assistance, under circumstances where their own rights were affected.

The Petitioners' central argument is that this Court "must" focus equal protection analysis on the "rights of the resident alien workers", as if such a conclusion were required by this Court's decision in *Madera Co. v. Industrial Commission*, 262 U.S. 499 (1922). Here the Petitioners urge this Court to engage in sleight of hand in analyzing the threshold questions regarding what persons have interests at stake, and what rights they may assert. Contrary to the Petitioners' claims, this Court's precedents do not "establish that the focus of the equal protection analysis in this case must be centered on the rights of the resident alien workers . . . ". *See* Petition, p. 8.

In *Madera, supra*, this Court affirmed the authority of a state legislature to grant to nonresident aliens a statutory death benefit, in the face of a substantive due

process/unconstitutional taking challenge by the employer. This Court found that creating such a benefit was a permissible exercise of legislative power, as there was some rational basis for doing so.

> . . . there is no constitutional provision requiring that the benefits of such legislative scheme be limited to citizens or residents of the state.

Id. at 503. Conversely, *Madera* does not support the Petitioners' proposition that the equal protection clause of the Constitution requires that the legislature do what the due process clause permits it to do. *Id.*

Further, characterizing the disability and death benefits provisions of workers' compensation acts as being "component parts of a single system of rights and liabilities arising out of the employer-employee relationship" does not lead to the conclusion that different types of claimants, entitled to separate and mutually exclusive types of benefits, may stand in one another's shoes in order to gain a constitutional trump card, which they otherwise lack. *Id.* at 501. A party must still have standing to assert its own constitutional rights, if any.

2. The nonresident alien petitioners cannot invoke the protections of the equal protection clause, such that any "discriminatory" aspect of the statute is not unlawful.

Merely invoking the value charged words "discriminatory" and "based upon alienage" will not create a constitutional barrier to any and every classification which may affect aliens. Indeed, this Court has held that the Constitution does not require that all aliens be entitled to enjoy all of the advantages of citizenship, or that all aliens must be placed into a single homogenous legal classification. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). Rather, for any statute to be constitutionally infirm

regarding aliens, there must be an actual violation of an identifiable constitutional right.

Nevertheless, the Petitioners urge this Court to adopt the defective analysis employed by the Supreme Court of Kansas in *Jurado v. Popejoy Construction Co., supra,* wherein that court ventured,

> Simply because the statute does not similarly discriminate against resident aliens does not make it any less an alienage classification.

Id. at 675. The fallacy in that court's reasoning is obvious. The statute classifies based upon a combination of alienage and nonresidency. The persons affected, the nonresident dependents, are outside the territorial jurisdiction, and therefore utterly without constitutional rights to be violated. U.S. CONST. amendment XIV; *Verdugo-Urquidez, supra; Johnson v. Eisentrager, supra.*

Further, it is obvious that there is independent constitutional support for the classification resulting in United States citizens who are nonresidents being treated differently from mere nonresident aliens. Citizens derive additional constitutional protections beyond those afforded to aliens through operation of the privileges and immunities clause of the federal Constitution. United States Constitution, Amendment XIV. Therefore, the "disparate treatment of these two classes of nonresidents" is not "solely based on alienage", and thus impermissible. Constitutional rights arise from either citizenship or residency; when both are lacking, the pertinent party may not invoke constitutional protections.

The Supreme Court of Georgia correctly analyzed the problem in framing the issues in its opinion:

> This case raises two issues: first, whose rights are at stake, the decedent worker's or the nonresident dependents? Second, does O.C.G.A. §34-9-265(b)(5) violate the pertinent party's rights . . . ?

See Appendix of Petition, pp. 3, 4. Correctly analyzed, the question was correctly answered: the pertinent parties, asserting whatever rights they may have, are unable to make any claim to constitutional equal protection rights, such that the statutory classification is not an unlawful one.

It is respectfully submitted that the arguments presented by the Petitioners, and apparently accepted by the courts of Kansas and Florida, constitute little more than a constitutional subterfuge, designed to achieve what the Petitioners perceive as a "desirable" result. If it is desirable to achieve such a result, this purely policy decision must be made by the legislatures, and should not be effected by this Court's adopting a tortured reading of decades of constitutional precedent regarding standing and jurisdiction.

E. THE ISSUE PRESENTED IN THIS CASE IS SUCH THAT THE OUTCOME IS GOVERNED BY INDEPENDENT STATE GROUNDS.

A given case is not properly within the jurisdiction of this Court if the decision of the state court would still be upheld on independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). Even assuming that the Petitioners had properly preserved any federal question, the threshold question of the nature of the rights of the pertinent party is one of exclusively state statutory construction. Of course, a state may not enact and construe a statutory scheme so as to defeat a legitimate federal constitutional interest. Nevertheless, in a case where the statute creates a benefit which in itself is not federally mandated, and which is not dispensed in a manner which violates the rights of any actually protected class, it cannot be said that the federal Constitution requires that this Court substitute its judgment for that of the state in defining the

nature of the benefit. Absent a design to circumvent the federal Constitution, a question of state statutory construction is solely a state court question. *Cf. Williams v. Georgia*, 349 U.S. 375 (1955). Indeed, the jurisdiction of this Court is not invoked as to purely state law questions. 28 U.S.C.A. §1257.

Here, this Court would render a mere advisory opinion if it did review this case, because the unavoidable threshold question is one of state law, that is, the nature and scope of the benefits created by the state statute. As there is no resident alien who is actually affected by the portion of the statute complained of, there is no federal law violation inherent in the statute as construed. *Michigan v. Long, supra.*

F. ASSUMING, *ARGUENDO*, THAT NONRESIDENT FOREIGN NATIONALS COULD INVOKE SOME DEGREE OF CONSTITUTIONAL EQUAL PROTECTION SCRUTINY AS TO THEIR OWN RIGHTS, THE APPROPRIATE TEST WOULD BE THE "RATIONAL BASIS" TEST.

It should be clear that foreign nationals residing in their native lands may not invoke heightened judicial scrutiny under equal protection, as such scrutiny is reserved to protect the rights of the "discrete and insular minority" of aliens actually residing within the United States. *Yick Wo v. Hopkins, supra; Graham v. Richardson, supra; Johnson v. Eisentrager, supra.* As heightened scrutiny does not apply here, the question arises, what if any level of equal protection scrutiny should be applied? On the one hand, it is submitted that nonresident aliens are entitled only to due process, but not equal protection, as the appellate courts of several sister states have found in

deciding similar challenges. *Alvarez Martinez v. The Industrial Commission, supra; Pedrazza v. Sid Fleming Con., Inc., supra.*

Notwithstanding the compelling arguments for the complete inapplicability of equal protection to the facts of the present case, it is readily apparent that the challenged statute should survive equal protection scrutiny. Absent any basis for the invocation of heightened scrutiny, the challenged statute limiting death benefits accruing to foreign nationals is entitled to a presumption of validity, and must be upheld, as it is based upon rational distinctions, where the basis of the classification can be construed as bearing a direct and real relation to the object or purpose of the legislation. *McDonald v. Board of Election*, 394 U.S. 802 (1969); *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

Under this far more deferential standard of review, the challenged statute easily withstands the equal protection challenge. The Petitioners have failed to carry their burden of demonstrating that the challenged classifications cannot rationally be sustained. If for no other reason, the classification establishing a strict limitation of liability benefiting foreign nationals should be sustained, in that the classification is born "not of any desire to discriminate but one of the awkward problem of truth and continuing administration which is unavoidably present in those cases." Larson, *Workmen's Compensation Law*, §63.51 (1992). It is certainly reasonable to conclude that the legislature had a legitimate rational basis for declining to place upon the employers and insurers of Georgia a duty to forward open-ended dependency benefits to persons residing in foreign countries, without having the benefit of any unduly burdensome means of monitoring the continuing dependency status of the recipients. Unlike life insurance, the beneficiaries under the

workers' compensation death benefits provision are not absolutely entitled to ongoing receipt of benefits of a predetermined value; rather, such recipients are subject to periodic confirmation of their dependency status, as "the compensation provided for in this code section shall be payable only to dependents and only during dependency." O.C.G.A. §34-9-265(c).

It should be noted that the argument advanced by Petitioners, to the effect that preferential treatment of Canadian dependents over all other nationalities, is somehow constitutionally offensive, is itself wholly without constitutional support. Citing the dissent of Justice Benham in the decision of the court below, Petitioners argue that preferential treatment, not in itself required by the Constitution, to Canadian workers, is somehow "irrational". First, such argument completely ignores the simple fact that the United States has traditionally enjoyed a unique economic and political relationship with Canada that is not shared with any other foreign country. Second, there simply is no constitutional support for the argument that the granting of a non-required benefit to one group of foreign nationals somehow constitutes a denial of a required benefit to another group. Indeed, as stated by this Court in *Mathews v. Diaz, supra,* the Constitution does not require that all classes of aliens be treated in an identical manner.

G. NO SUPREMACY CLAUSE ISSUE WAS RAISED BELOW, AND THE SUPREMACY CLAUSE IS NOT VIOLATED BY THE GEORGIA STATUTE.

1. The Petitioners may not raise a supremacy clause issue for the first time in their petition to this Court.

As has been argued extensively earlier, the Supreme Court of the United States will not review a claim that a

state statute is constitutionally invalid where no federal question was preserved and decided by the state court of last resort. It is hornbook law, moreover, that the U.S. Supreme Court will decline to address any federal constitutional issue raised for the first time in a petition for review to the Court. *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 112 (1908).

In their petition to this Court, the Petitioners have for the first time raised the issue whether the Georgia statute is invalid under the supremacy clause by reason of the specific grant to the Congress of power over naturalization and immigration contained in article I, §8, cl 3 and 4 of the U.S. Constitution. (Petition, pp. 26-28) No decision below, and no pleading below filed by the Petitioners, makes any argument grounded in a constitutional provision (whether it be the Georgia Constitution or, arguably, the federal Constitution) *other than the asserted denial of equal protection.* The question whether the supremacy clause is violated by the Georgia statute because of the Congress' plenary powers under article I, §8, cl 3 and 4 has not been raised for a decision by any court below and, thus, this Court has not been presented with a claim as to that constitutional provision subject to this Court's appellate jurisdiction under 28 U.S.C.A. §1257(a). *Board of Directors of Rotary International v. Rotary Club of Duarte, supra.*

2. The supremacy clause is not violated by the Georgia statute.

The supremacy clause of the federal Constitution (art. VI, cl 2) is not itself a source of any federal rights; rather the supremacy clause secures federal rights – whether created by other, substantive provisions of the Constitution, or by treaty, statute, or regulation – whenever they come into conflict with state law. *Dennis v.*

Higgins, ___ U.S. ___, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). Here, the Petitioners cite no provision of the Federal Immigration and Nationality Act, 8 U.S.C. §1101 *et seq.*, as having been violated by O.C.G.A. §34-9-265(b)(5), as indeed they could not do since that comprehensive codification of matters dealing with alienage and immigration does not guarantee workers' compensation death benefits of any description. Instead, the Petitioners rely for their authority on art. I, §8, cl 3 and 4 alone.

The Petitioners allege that O.C.G.A. §34-9-265(b)(5) "imposes a severe and punitive burden on the terms of residence for alien workers lawfully in this country who have non-resident alien dependents." (Petition, §III, p. 27). The Petitioners further attack "[t]he statute's imposition of such unequal terms and conditions of employment based upon alienage. . . . " (Petition, §III, p. 28) However, the Petitioners have placed no evidence on the record below that O.C.G.A. §34-9-265(b)(5) has any such effect, as a matter of *fact* rather than suggestion or speculation. Thus, in this respect, the record is not ripe for review by the U.S. Supreme Court. *Pennell v. City of San Jose, supra; cf., Alvarez Martinez v. Industrial Commission of Utah, supra.*

Even without such evidence in the record, however, it is obvious that the Georgia statute does not place a burden on an alien's entrance into this country, his residence within this country, or his opportunity to find employment within this country. Rather, the contrary is true: alien workers might actually be encouraged to bring their dependents to the United States where they will receive *the same* workers' compensation death benefits as the dependents of U.S. and Canadian citizens.

In a case squarely on point, the Utah Supreme Court upheld the validity of a Utah statute which allowed non-resident dependents of aliens one-half the death benefits provided to dependents residing in the United States or Canada. *Alvarez Martinez v. Industrial Commission of the State of Utah, supra.* There, the Utah statute was challenged on four bases, including that it violated the supremacy clause and the plenary power of Congress to regulate immigration and naturalization. Disposing of the supremacy clause issue first, the Utah court found that since the Utah statute did not conflict with any treaty between the United States and Mexico, the supremacy clause was not violated. *Id.*, at 417. Turning last to the issue of Congress' power to regulate immigration and naturalization, the Utah court distinguished *Graham v. Richardson, supra,* since the Arizona and Pennsylvania statutes challenged there (placing durational residency requirements on the receipt by aliens of state welfare benefits) were held to have placed a burden on an alien's entrance into or residence within the United States or on that alien's dependents. *Id.*, at 419. The Utah court held that the Utah statute does not place a burden on any of these persons or interests, noting, as is true on the record here, the claimant's failure to offer any more than mere speculation that the statute being challenged actually placed any burden at all interfering with federal statute or policy.

Thus, the Court is urged to reject the Petitioners' arguments on the supremacy clause issue since it was not raised below, and since the Petitioners have failed to place any evidence on the record that O.C.G.A. §34-9-265(b)(5) places any burden in fact on an alien's entry into or residence within the United States or on an alien's dependents.

IV.

CONCLUSION

For the reasons herein stated, the Petitioners have failed to preserve and obtain ruling upon any federal question, such that any review of this case should be completely denied by this Court. However, assuming that this Court were to review the merits of this case, it is apparent that the Petitioners do not have standing to assert equal protection objections to the challenged statute, pursuant to the United States Constitution. Rather, the Petitioners are nonresident aliens, who may not assert the protections of the equal protection clause. Further, it is apparent that the judgment of the state court below would be affirmed on independent state grounds, in the event that this Court were to review this case, such that only an advisory opinion would issue. Finally, no federal supremacy clause issue has ever been raised at any stage of this litigation, such that no such issue may be considered by this Court. Further, the Petitioners have utterly failed to demonstrate any violation of federal law pursuant to the supremacy clause, by operation of the challenged Georgia statute. For these reasons the Petition for Writ of Certiorari should be denied.

Dated: Decatur, Georgia, October 15, 1993.

Respectfully submitted,

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APPENDIX I

IN THE SUPREME COURT OF THE STATE OF GEORGIA

JOSE A. MORALES, DECEASED EMPLOYEE JULIA CORPUS DE MORALES, WIDOW, JUAN ANTONIO MORALES, AND DANIEL MORALES, MINOR CHILDREN/APPELLEES vs. BARGE-WAGNER [sic], INC., EMPLOYER/APPELLANT and ARGONAUT INSURANCE COMPANY, INSURER/APPELLANT	) SUPREME COURT CIVIL CASE NO.: S93A0252) FULTON COUNTY SUPERIOR COURT CIVIL ACTION FILE NO.: E-03875) STATE BOARD OF WORKERS' COMPENSATION CASE NO.: 451-93-5853

BRIEF OF THE APPELLEES

I. STATEMENT OF THE CASE

This appeal has been docketed pursuant to an application for discretionary review, filed by the Appellants, seeking review by this Court of the judgment of the Superior Court of Fulton County, regarding a constitutional question presented in a workers' compensation claim. On appeal from the award of the State Board of Workers' Compensation, the court below declared O.C.G.A. Section 34-9-3-265(b)(5) to be unconstitutional under Georgia Constitution (1983), Art. I, Section 1, Para.

2, specifically equal protection. Pursuant to O.C.G.A. Section 34-9-265(b)(5), the State Board of Workers' Compensation had directed the Appellants to make payment to the Appellees in an amount limited to $1,000.00. In declaring the statute to be unconstitutional, and in reversing the award of the State Board, the court below directed that the case be remanded to the State Board for reconsideration in light of the Court's order invalidating the limiting statute. The Appellants timely filed their appeal, seeking review of the order of the court below. As this case was docketed in this Court on November 17, 1992, this brief of the Appellees is timely filed.

STATEMENT OF FACTS

There are no factual disputes in this case. Jose Morales, 31, was, on the day of his death, employed as a construction worker by Barge-Wagner Construction Company. On September 19, 1990 he fell 22 stories to his death while in the course of his employment. At the time of his death his wife and two small sons were residing outside the United States in Mexico. The widow and two minor children were wholly dependent on deceased employee's earnings for their support at the time of his death.

O.C.G.A. 34-9-265(b)(2) states:

> The employer shall pay the dependents of the deceased employee, which dependents are wholly dependent on his earnings for support at the time of the injury, a weekly compensation equal to the compensation which is provided for in Code Section 34-9-261 for total incapacity . . .

however, O.C.G.A. 34-9-265(b)(5) provides:

> If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

Therefore, as the Widow/Appellee and her two children were neither citizens nor residents at that time, the amount of compensation was limited by the State Board in the amount $1,000.00 pursuant to O.C.G.A. Section 34-9-265(b)(5).

ARGUMENT AND CITATION OF AUTHORITY

The Superior Court of Fulton County was correct in determining O.C.G.A. 34-9-265(b)(5) violates the equal protection clause of the Georgia Constitution. The equal protection clause of the Georgia Constitution provides:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws. Ga. Const. Art. I, Sec. I, Par. 2.

O.C.G.A. 34-9-265(b)(2) provides death benefits for the dependants of a worker who dies in the course of his employment. This Code Section states:

> The employer shall pay the dependents of the deceased employee, which dependents are wholly dependent on his earnings for support at the time of the injury, a weekly compensation equal to the compensation which is provided for in the Code Section 34-9-261 for total incapacity . . .

These death benefits are commensurate to a property right awarded dependent beneficiaries. This property right was created by the State of Georgia itself through its workers' compensation legislation. O.C.G.A. 34-9-265(b)(5) discriminates against non-Canadian non-resident dependents. This code Section states:

> If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canadian [sic] at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

To deny *certain* non-resident dependents full benefits while at the same time carving out an exception for *other* non-resident dependents is not impartial treatment.

If a Canadian family of a deceased worker wanted to sue the employer for negligence, their case would be barred by the exclusive remedy provision of the workers' compensation act. The family's sole remedy would be death benefits offered under O.C.G.A. 34-9-265(b)(5).

O.C.G.A. 34-9-265(b)(5) also bars a non-resident non-Canadian family from suing the employer yet only provides $1,000.00 in exchange for the taking away of their common law remedy.

This situation created by O.C.G.A. 34-9-265(b)(5) does not offer *equal* protection to *all* non-resident families of deceased workers.

Laws may discriminate in several ways. A law may be discriminatory on its face; by unequal administration, or impermissible motive. Appellees contend O.C.G.A. 34-9-265(b)(5) constitutes discrimination on its face by

creating *two classes* of non-resident dependents, Canadians and others. The two classes of people to be most likely affected by this law are the Canadians and Mexicans as they are most likely to cross the border to find employment. There is absolutely no way to deny ethnic, alienage, and racial differences between Mexicans and Canadians.

The Superior Court of Fulton County determined that a test of "strict scrutiny" should apply to the review of O.C.G.A. 34-9-265(b)(5) and that using this standard of review it failed.

Appellees contend that even if the lesser test of "rational basis" urged by Appellants were used, O.C.G.A. 34-9-265 (b)(5) would fail. As the Florida Supreme Court said in its decision overturning a similar statute in 1989 . . .

> "It is apparent from the face of the statute that it cannot pass a rational basis test, much less the heightened scrutiny applicable when official discrimination occurs based on alienage."
>
> "The $100,000.00 insurance benefit that is available to petitioners in this instance is available to Canadian workers, even in cases where those workers are in this country illegally. What possible state purpose would justify giving a benefit to non-resident Canadians that is denied Mexicans? . . . We can discern no rational basis for the distinction drawn between the northern boarder and the southern one by this statute." *de Ayala, et. al. v. Florida Farm Bureau Casualty Insurance Co., et. al,* 543 S 2d 204(1989). (For the Court's convenience a copy of this decision is attached.)

Appellants in their brief would lead this Court to believe that a majority of other jurisdictions have upheld a similar type of statutory provision limiting benefits in a similar manner as Georgia. This is not true. A survey of all fifty states reveals the following:

> Thirty-Seven (37) states make *no* distinction between dependents residing in the United States and those not residing in the United States.
>
> Four (4) states reduce death benefits to *all* non-resident dependents. 2 of these reduce to 50% the death benefits 1 to 60% of the death benefits. 1 reduces to $750.00 to *all* non-resident dependents.
>
> Six (6) states provide the *same* benefits to non-resident non-Canadian dependents but allow the insurers to pay in a lump sum discounting between 4% and up to sometimes 50% for illegible interest.
>
> Two (2) states provide 50% of the normal death benefits to non-residents non-Canadian dependents.
>
> and of course one (1) state, Georgia, reduces benefits to $1,000.00 to non-resident non-Canadian dependents.

This Court can see that a majority of jurisdictions do *not* have a provision similar to O.C.G.A. 34-9-265(b)(5) in their workers' compensation statutes.

The Appellants go to great lengths to point out that under federal law non-resident aliens are non-persons and have no guarantees under our federal or state constitutions. However, as the Superior Court of Fulton County

found, once a property right *is* created by the State for non-resident aliens these rights should be protected impartially. "The petitioners, non-resident aliens, are being denied equal protection under the Georgia Constitution because they are denied death benefits available to non-resident aliens from Canada."

The Florida Supreme Court in their decision overturning the aforementioned similar statute stated:

> "While the legislature certainly has authority to dictate the mechanism for computing a particular worker's compensation, it may not attach conditions to those computations that discriminate against persons based on constitutionally impermissible grounds. Under both our federal and state constitutions, as well as our common law heritage, all similarly situated person are equal before the law. *de Ayala, et. al. v. Florida Farm Bureau Casualty Insurance Co., et. al.*, 543 S. 2d 204 (1989).

CONCLUSION

For the reasons discussed above, Appellees request the Court affirm the decision of the Superior Court of Fulton County, invalidating O.C.G.A. 34-9-265(b)(5) as violative of the equal protection clause of the Georgia Constitution.

Respectfully submitted the 28th day of December, 1992.

/s/ Bonny Berry Wilder
BONNY BERRY WILDER
Counsel for Employee's
Dependents
Georgia Bar No. 758633

[Petitioners attached as an appendix to their brief to the Supreme Court of Georgia a photocopy of the decision of the Supreme Court of Florida in *De Ayala v. Florida Farm Bureau Casualty Insurance Co., supra.* That appendix has been omitted here.]

APPENDIX II

IN THE SUPREME COURT
STATE OF GEORGIA

JOSE A. MORALES, Deceased /Employee, JULIA CORPUS de MORALES, WIDOW, JUAN ANTONIO MORALES AND DANIEL MORALES, MINOR CHILDREN, v. BARGE-WAGENER, INC., Employer, and ARGONAUT INSURANCE CO., Insurer.	APPLICATION NUMBER: S93A0252 STATE BOARD OF WORKERS' COMPENSATION CLAIM NUMBER: 451-93-5853

APPLICANT'S MOTION FOR RECONSIDERATION

COMES NOW, the widow and minor children of deceased Employee, Jose A. Morales, and file this their Motion for Reconsideration pursuant to Rule 47 of the Supreme Court and shows this Honorable Court as follows:

On May 24, 1993 the Supreme Court of Georgia issued a decision reversing the decision of the Honorable Don A. Langham, Superior Court of Fulton County, in which he found O.C.G.A. §34-9-265(b)(5) violative of the Georgia Constitution.

Accordingly, and within the time period proscribed by Rule 47, Applicants urge this Honorable Court to reconsider its previous decision.

STATEMENT OF THE FACTS

Jose A. Morales plunged 22 stories to his death on September 19, 1990. He left a widow and two young sons who resided in Mexico. The Georgia State Board of Workers' Compensation was obligated to award $1,000.00 in death benefits in accordance to O.C.G.A. §34-9-265(b)(5) which states:

> "If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00."

An appeal was filed in Fulton Superior Court and the Honorable Dan A. Langham, on August 28, 1992 issued an order reversing the Workers' Compensation Board award of $1,000.00. Judge Langham ruled that O.C.G.A. §34-9-265(b)(5) was violative of the Georgia Constitution as "The protection granted by O.C.G.A. §34-9-265(b)(5) is not impartial". He further ruled the right impinged is one which Georgia has held commensurate to a property right. As the law in question has an impact on a "suspect class" dealing with alienage, under the strict scrutiny analysis Judge Langham found O.C.G.A. §34-9-265(b)(5) failed to serve a compelling government objective.

An application for discretionary appeal to the Georgia Supreme Court was then filed by Employer, Barge-Wagener and its Insurer, Argonaut Insurance Company.

ARGUMENT AND CITATION OF AUTHORITY

This Honorable Court determined, and rightly so, that the Workers' Compensation death benefits of Jose A. Morales belong to the dependents. But how did they obtain these benefits? As non-resident aliens they had no innate right to any death benefits *except* those created by the Georgia Legislature in O.C.G.A. §34-9-265(b)(5).

Our legislature created in 1920 a property right for the non-resident non-Canadian dependents of a deceased worker. These families could have been totally excluded. In the 1920's many laws promulgated escaped the scrutiny of equal protection violations.

Our State Constitution in Art.1, §1, ¶2 states: "Protection to person and *property* is the paramount duty of government and shall be impartial and complete." It is the lack of impartiality of O.C.G.a. §34-9-265(b)(5), granting benefits to Canadian non-resident dependents and denying those same benefits to other non-resident dependents that renders it discriminatory, as this Court has found.

However, this Court then drifts in its analysis to the U.S. Constitution and finds this family has no protection under the U.S. Constitution. Rightly so, perhaps as the property right created is *not* a federally legislated property right.

Applicants would argue this Court look no further in its equal protection analysis than the State Constitution of Georgia. The property right was created by the State of

Georgia and should be governed by our State Constitution which declares that protection to person and property shall be *impartial* and complete. Any law promulgated which does not live up to *this* standard should fail upon constitutional challenge.

This decision if it stands creates a situation where unscrupulous employers with dangerous work could purposely hire individuals with families outside of the U.S. or Canada so that in the event an employee dies their liability is limited to $1,000.00. In addition, if a worker is clinging to life, an employer might just decide to delay calling an ambulance as it would be cheaper if the employee dies with liability limited to only $1,000.00.

Certainly, this Court would agree that Canadian dependent families belong to the *same class* as other non U.S. dependent families. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975). Applicants ask this Court to reconsider its decision which stands for the premise that the State of Georgia *can* discriminate in a lawful manner by bestowing a property right in a capricious and non-uniform manner to a class of similarly situated individuals.

CONCLUSION

Applicants urge each Justice to consider the legality of this admitted discrimination which bestows a property right to a similarly situated class of dependents in a non-uniform and capricious manner which is clearly *not impartial* and thus violative of our State Constitution.

Applicants request the Court reconsider its prior decision and reverse itself.

Respectfully submitted,

/s/ Bonny Berry Wilder
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